

THE CHARTER BOARD OF THE CITY OF READING

IN RE: 4th Lease Addendum Between : Complaint Received: Feb. 19, 2016
 City of Reading and Reading, :
 Area Water Authority : Investigation No. 47

FINAL OPINION AND ORDER

The Charter Board of the City of Reading (“Board”) after hearing conducted September 20, 2016 (“Hearing”), issues the following Final Opinion and Order.

I. FINDINGS OF FACT

A. Procedural History

1. On or about February 19, 2016, the Board’s Investigative Officer, Elizabeth A. Magovern, Esquire (“Investigative Officer”) received a Charter Board complaint¹ (“Complaint”) filed by Ernest H. Schlegel, Jr. (“Complainant”).
2. Complainant resides at 934 Pear Street, City of Reading, Berks County, Pennsylvania, is a taxpayer of the City of Reading (“City”) and at the time of the filing of the Complaint served as the Chairman of the Reading Area Water Authority’s (“RAWA”) Board of Directors.
3. On February 26, 2016 the Board assigned the Complaint to mediation under the Mediation Program.
4. Mediation on the Complaint occurred on March 24, 2016.
5. The Mediation did not resolve the Complaint.
6. Upon the conclusion of the full investigation, the Investigative Officer, on or about July 8, 2016, issued her Findings Report.

¹ The Complaint involved, generally, as more specifically discussed in this Final Opinion, Reading City Council’s alleged violation of the Municipality Authorities Act, and consequently a violation of the City of Reading Charter, § 102, and a violation of the Administrative Code concerning the failure to retain independent counsel through a Request for Proposals. *See* Complaint.

7. On or about July 26, 2016, Tonya A. Butler, Esquire, Assistant Solicitor, and counsel for subject, Reading City Council ("Council"), requested an evidentiary hearing under Section V(A)(7) of the Charter Board Ordinance ("C.B.O.")

B. Stipulated Facts

The Investigative Officer and Mark Merolla, Esquire attorney for Council, provided the Board with a stipulation, entered as Joint-1 on the record. The Board accepts the following stipulated facts and adopts them from Joint-1:²

1. The City created RAWA as a municipal authority in accordance with the Municipality Authorities Act, approving and filing Articles of Incorporation on or about May 5, 1994, to operate and manage the City's water system. I.O. Findings of Fact, No. 2.

2. Pursuant to a lease agreement ("Lease") and subsequent amendments, RAWA operated and managed the City owned water system and assets. I.O. Findings of Fact, No. 3.

3. On March 31, 2014 Council adopted Resolution 45A-2014 directing the Solicitor, Charles D. Younger, Esquire ("Solicitor") to issue a Request for Proposals ("RFP")³ for the retention of independent legal counsel to assist Council with matters pertaining to RAWA. I.O. Findings of Fact, No. 4.

4. The City of Reading Purchasing Coordinator did not receive instructions to issue an RFP for the retention of independent legal counsel to assist Council with matters pertaining to RAWA pursuant to Resolution 45A-2014.⁴ I.O. Findings of Fact, No. 5.

² I.O. Findings of Fact, No. 31 has not been accepted by the Board as a Finding of Fact.

³ See Administrative Code, Section 8, *Purchasing of Professional Services*.

⁴ On March 3, 2014 the Mayor and Council issued an RFP for legal advisory services in support of the long-term lease or concession of the City's water system to which responses were received. The City's Purchasing Coordinator affirmed that someone, whom she cannot recall, canceled the RFP.

5. The Solicitor is responsible for serving as chief legal advisor to the Mayor, the Council, and all City departments and agencies; and shall represent the City in all legal proceedings and shall perform such other duties prescribed by law, by the Charter, by the City Administrative Code or action of Council. I.O. Findings of Fact, No. 6; City of Reading Home Rule Charter (“Charter”), § 801.

6. Historically, the Solicitor has opined that when a conflict of interest exists between the Mayor and Council, the Mayor and Council must obtain independent legal counsel. I.O. Findings of Fact, No. 7.⁵

7. Sometime before April 23, 2014 (in late March or early April 2014), the Solicitor opined that a conflict of interest existed between the Mayor and Council regarding the operation and lease of the City's water assets. I.O. Findings of Fact, No. 8.

8. In accordance with the Solicitor's determination, on April 19, 2014, the Solicitor executed an engagement letter with the law firm of Stevens & Lee, P.C. (“Stevens & Lee”) for its representation of Council regarding matters pertaining to RAWA. I.O. Findings of Fact, No. 9.

9. On April 23, 2014, the Solicitor altered his opinion and advised Council via a memorandum that a conflict of interest did not exist between Council and the City Administration.⁶ I.O. Findings of Fact, No. 10.

10. In addition, on April 23, 2014, the Solicitor issued correspondence to Stevens & Lee terminating its legal services for representation of Council regarding the City's water assets. I.O. Findings of Fact, No. 11.

⁵ The Board does not find that the Solicitor always acted in accordance with this “historic” practice.

⁶ The Solicitor also opined in his memorandum to Council dated April 23, 2014 that he did not utilize the Request for Proposals process in retaining conflict counsel and opined that retention of Stevens & Lee without undertaking an RFP could be subject to challenge.

11. Subsequent to the April 23, 2014 memorandum, Council held an executive session with the Solicitor regarding the retention of independent legal counsel for representation of Council regarding the water assets. I.O. Findings of Fact, No. 12.

12. At the conclusion of the executive session, the Solicitor changed his opinion again and opined that there existed a conflict of interest between Council and the City Administration and authorized retention of Stevens & Lee to represent Council regarding the water assets of the City. I.O. Findings of Fact, No. 13.

13. On April 28, 2014, Council adopted Resolution 58-2014 whereby it retained Stevens & Lee as independent legal counsel for Council for assistance with matters related to the dissolution of RAWA and creation of a new authority. I.O. Findings of Fact, No. 14.

14. Resolution 58-2014 provided for retroactivity to April 21, 2014, directed the invoices submitted by Stevens & Lee for legal services provided to Council be paid by the Administration and stated that a conflict existed between Council and the Mayor and his Administration regarding termination of the water lease and dissolution of RAWA which required Council to retain independent legal counsel. I.O. Findings of Fact, No. 14.

15. Council did not retain Stevens & Lee pursuant to an RFP⁷ regarding RAWA. I.O. Findings of Fact, No. 15.

⁷ On September 22, 2014 Council enacted Bill No. 69-2014 transferring funds from the Contingency Fund to the Council Office Legal Expenses, presumably to pay Stevens & Lee legal expenses. On October 2, 2014 Mayor Spencer vetoed Bill 69-2014 stating that no conflict existed to require Council to retain outside counsel, Stevens & Lee. Council overrode the veto. On December 8, 2014 Council enacted Bill 84-2014 which approved and authorized the Mayor to execute a settlement agreement between the City of Reading and Stevens & Lee regarding fees for legal services rendered. The Ordinance provides that the Administration and Council had differing views regarding the procedures for retention of Stevens & Lee for certain legal services and as a result there were outstanding bills for services rendered.

16. On April 28, 2014 Council introduced Bill No. 46-2014 notifying RAWA and other parties of the termination of the water lease, dissolving RAWA and authorizing requisite actions to accomplish the same. I.O. Findings of Fact, No. 22.

17. Bill No. 46-2014 further demanded that all RAWA board members resign and provided penalties for Board members that failed to comply with their responsibilities to dissolve RAWA.⁸ I.O. Findings of Fact, No. 22.

18. At its May 27, 2014 meeting, Council enacted Bill No. 46-2014.⁹ I.O. Findings of Fact, No. 23.

19. Members of Council subsequently requested and participated in a meeting with representatives of RAWA at which RAWA representatives were provided a list setting forth demands to commence negotiations of a 4th Addendum ("4th Lease Addendum") to the Lease Agreement between the City and RAWA for the water assets and operation of the system. I.O. Findings of Fact, No. 24.

20. Complainant participated in the negotiations on behalf of RAWA. I.O. Findings of Fact, No. 25.

21. During the negotiations, Donald E. Wieand, Esquire, of Stevens & Lee, represented Council and Michael A. Setley, Esquire, of Georgeadis Setley, represented RAWA. I.O. Findings of Fact, No. 26.

22. As a result of the negotiations, Council and RAWA agreed to the 4th Lease Addendum. I.O. Findings of Fact, No. 27.

⁸ At a special meeting on March 31, 2014 Council introduced Bill No. 37-2014, to dissolve RAWA. Finding that Bill No. 46-2014 addressed RAWA's dissolution, Council withdrew Bill No. 37-2014 on May 27, 2014.

⁹ Mayor Spencer vetoed Bill No. 46-2014 on June 6, 2014. Council overrode the Mayor's veto of Bill No. 46-2014 on June 9, 2014.

23. Council enacted Bill No. 62-2014 on August 11, 2014 which directed the Mayor to execute the 4th Lease Addendum between the City and RAWA. I.O. Findings of Fact, No. 28.

24. On August 21, 2014, the Mayor vetoed Bill No. 62-2014 and in his veto memorandum notified Council that the Mayor cannot be directed by Council to execute a document.¹⁰ I.O. Findings of Fact, No. 28.

25. There is no prohibition against Council negotiating contracts in the Charter. I.O. Findings of Fact, No. 29.

26. Article III entitled *Mayor*, Section 308 entitled *Powers and Duties of the Mayor*, Subsections 308(a), (h), (k) and (n) and Article IV entitled *Managing Director*, Section 406 entitled *Powers and Duties of the Managing Director*, Subsections 406(1) and (7) of the Charter and identical provisions of the Administrative Code set forth the powers and duties of the Mayor and Managing Director, respectively, and provide in summary that said administration members shall obey all laws of the Commonwealth and enforce provisions of resolutions and Ordinances of Council of the City of Reading. I.O. Findings of Fact, No. 30; Charter, Article III, § 308(a), (h), (k) and (n); Article IV, § 406(1), (7). *See also corresponding sections of the Administrative Code.*

27. On July 28, 2014, Complainant, Council President Francis Acosta and Vice-President Jeff Waltman conducted a press conference to announce Council's and RAWA's agreement to the 4th Lease Addendum. I.O. Findings of Fact, No. 32.

28. On July 31, 2014, RAWA approved the 4th Lease Addendum. I.O. Findings of Fact, No. 33.

¹⁰ Council overrode the veto of Bill No. 62-2014 on August 25, 2014 noting that the Mayor refused to sign the Lease Addendum following Council's override of the veto.

29. On December 8, 2014 Council enacted Bill No. 99-2014 repealing Bill No. 62-2014, approving the 4th Lease Addendum with RAWA and directing the Mayor to sign the Lease Addendum.¹¹ I.O. Findings of Fact, No. 34.

30. Notwithstanding receipt of the December 11, 2015 letter from Steven A. Hann, neither Council nor RAWA took any action to remove the provisions of the 4th Addendum that it is alleged violated the Municipality Authorities Act (“MAA”).¹² I.O. Findings of Fact, No. 38.

31. The 4th Lease Addendum requires in paragraph 3 approval by Council of any RAWA contract for: 1) professional services; 2) related to the expansion of the water system and 3) under which RAWA is, or may be, obligated to pay more than Two Million and 00/100 Dollars (\$2,000,000.00) in any rolling twelve (12) month period or having a cumulate term of more than one year. I.O. Findings of Fact, No. 44.

32. Charter, Article I, *Powers of City*, Section 102 *Grant of Powers* provides that the City shall have the power to exercise any power or to perform any function not denied by the Constitution of the United States, by the Commonwealth of Pennsylvania, by act of the General Assembly of Pennsylvania, or by this Charter. I.O. Findings of Fact, No. 56.

C. Additional Facts

The Board finds the following additional facts:

31. The Solicitor did not comply with Council’s resolution, No. 45A-2014, directing him to issue an RFP to retain the services of special legal counsel to assist with the

¹¹ By Bill No. 66-2014, enacted on September 8, 2014, Council repealed Bill No. 46-2014 and accordingly repealed the dissolution of RAWA, termination of the Lease and Operating Agreement and required conveyance of the water system from RAWA to the City provided for in Bill No. 46-2014.

¹² As a result of its holding in this Final Opinion and Order, the Board will not address the specific terms in the 4th Lease Addendum alleged to have violated the MAA.

lease negotiations with RAWA. *See* Complaint at Exhibit 4; Memorandum of Atty. C. Younger, April 23, 2014; Affidavit of Atty. C. Younger, September 16, 2016.

32. The Solicitor did not issue an RFP at any time respecting the retention of special legal counsel for Council to assist with the lease negotiations with RAWA. Memorandum of Atty. C. Younger, April 23, 2014; Affidavit of Tammi Reinhart, June 24, 2016.

33. There existed reason and opportunity for Council to confirm whether or not it had retained Stevens & Lee through the required RFP process required by the Administrative Code, including the April 23, 2014 Memorandum of Attorney Younger, and the executive session which occurred on that same date, the several reversals of opinion by the Solicitor as to whether or not a conflict existed as between the Mayor and Council and the approval of the retention of Stevens & Lee by Resolution No. 58-2014.

34. Neither party provided any evidence that: a) Council ever reviewed an RFP prepared by the Solicitor for the retention of special counsel to assist with the lease negotiations with RAWA, b) the Solicitor ever prepared such an RFP, c) Council ever followed-up, inquired, or exercised any oversight, regarding the Solicitor's engagement of independent counsel.

35. None of the services provided by Stevens & Lee to Council in connection with RAWA were obtained through the required RFP process.

36. Stevens & Lee, without being retained through the mandated RFP process outlined in Administrative Code, Section 8, *Purchasing of Professional Services*,

charged Council not less than \$84,291.47. *See* I.O. Findings of Fact, Nos. 14 and 15; Bill No. 84-2014.¹³

D. Other Factual Matters

Factually, the parties stipulated to the admission of ten (1) exhibits.¹⁴ *See* Notes of Testimony (September 20, 2016) at pp. 38-40 *and* Exhibits “1” through “10.”

¹³ The Board takes judicial notice of Bill No. 84-2014, which includes as an attachment a certain settlement agreement wherein it is stated that Stevens & Lee will be paid \$84,291.47 as a compromised fee amount. The Board concludes by inference that the amount of fees actually charged to Council by Stevens & Lee exceeded that amount.

¹⁴ At hearing, the parties confirmed that they stipulated to the admission only, and not to the content, of the exhibits and that the Board could freely weigh and consider the exhibits. *See* Notes of Testimony (September 20, 2016) at pp. 38-40.

II. DISCUSSION

A. Preliminary Matter

As a preliminary matter, the Board must dispose of one substantive issue pertaining to its jurisdiction. Council contends that the Board is without jurisdiction to decide whether or not Council violated the Charter by violating the MAA. Council argues that because there has never been a judicial determination that any of the challenged provisions of the 4th Lease Addendum violate the MAA, that it is not within the Board's purview to decide that issue as a matter of first impression under state law. The Board disagrees.

Here, the Charter provides, at Article I, *Powers of the City*, Section 102, entitled *Grant of Power*, that the City shall have the power to exercise any power or to perform any function not denied by the Constitution of the United States, by the Commonwealth of Pennsylvania, by act of the General Assembly of Pennsylvania, or by this Charter. The City has no greater power than that afforded to it by the Commonwealth or the Charter. Certainly, the Board has the jurisdictional power to determine whether the City, or any governmental branch, department, or administrative employee, has violated the Charter. A finding that Council exceeded the powers afforded to it under Section 102 could support a conclusion that it had violated the Charter.

Further, the Board has on other occasions determined that a violation of state law also constituted a violation of the Charter. *See In re: Investigation of Vaughn Spencer, City Council President*, Inv. No. 29 (Feb. 8, 2011); *In re: Investigation of Charles D. Younger, Esquire, Solicitor of the City of Reading*, Inv. No. 30 (March 4, 2011). If Council's actions violate state law, and if those actions also violate the Charter, directly or indirectly, it is within the Board's jurisdiction. *See* Charter, Amendment I, §§ 1(a), 2(b).

On the basis of the foregoing, the Board denies Council's motion that the Board lacks jurisdiction to interpret state law in determining whether or not Council's conduct violated the MAA, which itself could be a violation of the Charter, Article I, § 102.

B. Questions Presented

1. Whether Council, by enacting an ordinance authorizing and directing the Mayor to execute the 4th Lease Addendum between the City and RAWA, violated the Charter, Article I, § 102 and Amendment I, § 1?

The Board answers in the negative.

2. Whether Council violated the Administrative Code, Section 8, *Purchasing of Professional Services*, of Exhibit "A", *Purchasing Policy*, in retaining independent counsel to represent the Council in negotiations with RAWA without utilizing an RFP to retain such counsel?

The Board answers in the affirmative.

C. Legal Discussion

The Board begins its analysis with the applicable provisions of the Charter and Administrative Code.

Underpinning all business of the City is Charter Amendment I, Section 1(a), *Supremacy of Charter*, which provides:

Governing law of the City. This Charter is the governing law of the City of Reading. No action or inaction by City Council, the Administration, or any other body created by this Charter shall be taken contrary to it, whether individually or collectively, by ordinance, resolution, practice, executive order or decision, or any other means.

The wording of the Charter, and acts pursuant to it, shall in all cases be strictly construed so as to effectuate its clear intent.

Critical in the analysis here in this matter, is Charter § 102, *Grant of Power*, which provides that:

The City shall have the power to exercise any power or to perform any function not denied by the Constitution of the United States, by the Constitution of Pennsylvania, by act of the General Assembly of Pennsylvania, or by this Charter.

Because of the potential for conflict between City Council and the Mayor, the Administrative Code addresses the selection of independent counsel. For instance, Administrative Code § 5-213 states:

In the event either the Mayor/Administration or City Council require legal representation in an area of conflict, each party shall have the ability to select their own legal counsel independent of the City.

Section 5-302, *Independent legal counsel*, provides that upon the identification of a conflict by the Solicitor as between the Mayor/Administration and City Council, and following a mediation process, if a conflict continues to persist, then each party may seek independent legal counsel separate from the Solicitor. However, § 5-302 makes clear that Administrative Code, Section 8, *Purchasing of Professional Services*, “shall apply.” Confirming independent representation in the event of a conflict, Section 5-811(A)(2) provides:

In the event either the Mayor/Managing Director or City Council requires legal representation in an area of conflict, each party shall have the ability to select their own legal counsel independent of the City Solicitor.

The selection of independent counsel must proceed through a specific RFP process, found at Administrative Code, Section 8, *Purchasing of Professional Services*. Sub-section 8.02 states that the requirement for RFPs for professional services, including attorneys, is applicable to "All departments, divisions, offices or agencies" of the City of Reading.

The Board is bound to interpret the Charter and is vested by Amendment I § 2(b) with the jurisdiction to “hear and decide all cases alleging violations of the Charter or Administrative Code,” excepting those arising under the Ethics Code or the Personnel Code. *See also* Ordinance No. 46-2005, as amended, at Section III(A). The Board has already determined that all questions presented by this matter arise within the Board’s jurisdiction. *See* Section II(A), *supra*.

1. Did Council's negotiation of the 4th Lease Addendum, and causing the addendum to be executed, violate Article I, § 102, of the Charter?

The Investigative Officer argues that Council violated the Charter, Article I, § 102, by negotiating and causing to be executed the 4th Lease Addendum. It is alleged that certain provisions of the 4th Lease Addendum violate the MAA, including:

- a. limitations on the selection and tenure of RAWA's solicitor;
- b. budgetary and debt limitations; and
- c. mandatory changes to the composition of the RAWA board.

The 4th Lease Addendum is a contract between Council, a body that must be compliant with the Charter and Administrative Code, and RAWA, a municipal authority that is not bound by those same documents.¹⁵

The evidence presented shows, however, that at all times during the negotiation, and at the time of the execution of the 4th Lease Addendum, RAWA had an attorney, Michael A. Setley, Esquire. In other words, RAWA stood in a position where it could bargain, where negotiations were not mere fictions, but in fact, occurred. The Board heard no evidence that RAWA took any legal steps whatsoever to block, stop, or challenge, in any way, the implementation of the 4th Lease Addendum prior to RAWA's execution of it. The Investigative Officer did not present any binding authority demonstrating that Council violated the MAA in conjunction with the 4th Lease Addendum. The Board's review of the MAA and case law at best demonstrates that it is an open question under Pennsylvania jurisprudence whether or not a governing body with the power to form, or terminate, a municipal authority also has the power to hobble, weaken or substantially control an already formed municipal authority.

¹⁵ The Charter and Administrative Code are not applicable to municipal authorities created under the Municipality Authorities Act, 53 Pa.C.S. § 5601, *et seq.* *In re: Purchasing Requirements of Boards, Authorities and Commissions* (Adv. Op. No. 4, Dec. 4, 2006).

The Investigative Officer did offer the December 11, 2015 opinion letter of Attorney Steven A. Hann, Esquire, wherein he opines as to the perceived legal shortcomings of the 4th Lease Addendum. Stipulated Exhibit No. 3. Attorney Hann's letter may be persuasive, and the Board recognizes the perception that Council is attempting to exert undue control over RAWA. But RAWA negotiated, approved and executed the 4th Lease Addendum, and Attorney Hann's letter points to no legal authority clearly prohibiting Council's conduct. A reading of Attorney Hann's letter reveals a policy interpretation of the MAA and related case law, sought by RAWA's counsel and rendered by Attorney Hann several months after the execution of the 4th Lease Addendum.

The Board is mindful that here RAWA stood complicit with its own entry into the 4th Lease Addendum. The Investigative Officer presented no evidence that Council dictated the terms of the 4th Lease Addendum, or that the terms were imposed by Council unilaterally, or that the alleged corruption of the MAA by Council somehow caused a substantive Charter violation beyond Article I, § 102. Rather, RAWA negotiated, approved and executed the 4th Lease Addendum, a document which RAWA itself did not protest.

There is insufficient evidence,¹⁶ and no case law, to establish that the negotiation, approval and execution of a perhaps over-burdensome inter-municipal agreement between a governing body and a municipal authority of its own formation violated either the MAA or the Charter.

¹⁶ This is not to say that the Board approves, or disapproves, of the restrictions placed on RAWA by Council. The Board passes no judgment on that issue. Likewise, the Board has not been presented with a substantive violation of the Charter linked or connected to the 4th Lease Addendum, and should such a violation be presented to the Board, it will be addressed at that time.

2. Did Council violate the City's Purchasing Policy in retaining Stevens & Lee as independent counsel without utilizing a Request for Proposals?

Following the Solicitor's determination that a conflict existed in his representation, it is stipulated that Council did not utilize the Request for Proposals process in retaining independent counsel, specifically Stevens & Lee. *See* Joint-1. Council appears to defend on the basis that it followed the advice of its Solicitor, arguing that there should be no Administrative Code violation found against it when it relies upon its counsel. Council's argument over-simplifies the facts, diminishes the independent responsibility of Council to conduct its affairs in compliance with the Charter and Administrative Code, and to oversee its Solicitor, and ignores prior decisions of the Board.

Stipulated Exhibits "1," "7," "8," and "9" all are consistent on the principal issue: Council did not issue an RFP under Section 8, *Purchasing of Professional Services*, of the Administrative Code. Further, both Council and the Investigative Officer agree that Council did not retain Stevens & Lee pursuant to an RFP. The Solicitor, in his affidavit, admits that he never issued an RFP in conjunction with Council's engagement with Steven and Lee. There is no question that Section 8, *Purchasing of Professional Services*, applied to the engagement of counsel in this instance.¹⁷

Council itself has responsibility for the conduct of its business. Here, it is not disputed that Council entrusted the selection and retention of independent counsel to the Solicitor.

However, it did so *after* the Solicitor determined that a conflict existed between the Mayor and Council, necessitating Council's retention of independent counsel. From the perspective of the

¹⁷ Section 8.03 specifically lists attorneys, including independent legal counsel as per Administrative Code, §§ 5-213 and 5-302. Donald E. Wieand, Esquire, a partner with Stevens & Lee retained by Council *without* utilizing an RFP, takes the position that Council did not need to utilize the RFP process under § 5-302. *See* N.T. at Ex. 9, Affidavit of Donald E. Wieand, Esquire (September 16, 2016) at Exhibit "A," no. 21. The Board disagrees, and the clear language of the Administrative Code, § 5-302, confirms that Section 8, *Purchasing of Professional Services*, applies to retention of independent counsel by Council.

Board, Council should have exercised more oversight of the Solicitor during this process in light of the existing conflict.

Moreover, evidence has not been presented to the Board demonstrating that, nor does the Board consider, the tasking of the selection and retention of conflict counsel to be “legal advice” from the Solicitor and Council. Rather, the agent, here the Solicitor, and the principal, here, Council, stand much less in a position of trust, and much more in a traditional principal/agent role where oversight is expected. The task here of the Solicitor could have been assigned in many different ways, including to a committee of Council, or to a single authorized member, or the City Clerk.¹⁸

That Council failed in its oversight, never inquired, followed up, asked to review, or to sign, an RFP is telling. Certainly, given the time-line and changed advice recited in the affidavits provided by Attorney Younger and the members of Council who provided affidavits, Council had ample opportunity and reason to inquire further into the retention of Stevens & Lee. Council abdicated to its conflicted Solicitor the responsibility to properly select and retain counsel. Council can not now point its collective finger at its agent, without bearing responsibility. This is consistent with the Board’s holdings in *In re: Investigation of Reading City Council*, Inv. Nos. 2-5 (June 15, 2007) and *In re: Investigation of Vaughn Spencer, City*

¹⁸ It is not lost on the Board that at the time of the underlying events in this matter, the Board had rendered at least one final opinion and order and one advisory opinion addressing the ministerial, non-discretionary, role of the City Clerk. *In re Investigation of Reading City Council* (Inv. No. 31, Apr. 25, 2011) at 12-14; *aff’d by Reading City Council v. City of Reading Charter Board*, No. 11-14382 (Berks Ct. Com. Pl. Feb. 17, 2012); *aff’d by Reading City Council v. City of Reading Charter Board*, No. 29 C.D. 2012 (Pa. Commw. Ct. Oct. 23, 2012); *In re Proposed Ordinance for Initiative and Referendum Process* (Adv. Op. 5, March 6, 2007) at 4. Council could have tendered compliance with the RFP process to the City Clerk instead of to the admittedly conflicted Solicitor. Oversight, follow-up and inquiry by Council is required regardless to whom it assigned the process to select independent counsel.

Council President, Inv. No. 29 (Feb. 8, 2011). Again, Council may not surrender to the Solicitor its responsibility to be compliant with the Charter and Administrative Code.¹⁹

The Board clearly announced this principle in Investigation No. 29 at page 13. In the matter now before the Board, Council's reliance on the Solicitor, without any oversight at all, on a matter not involving legal advice, and where the Solicitor is already conflicted, cannot serve as a justifiable excuse permitting a violation of Administrative Code, Section 8, *Purchasing of Professional Services*.

D. The Solicitor

Although in this proceeding no Charter or Administrative Code violations have been asserted against the Solicitor, Attorney Charles Younger, and he is not a subject of the Complaint, the Board is compelled to inquire on his nonfeasance in this series of events. As it relates to the Solicitor, the Board must ask:

1. Why the Solicitor, after finding a conflict, believed it appropriate to oversee the retention of independent counsel?
2. Why the Solicitor made a series of rapid and largely unexplained reversals regarding his opinion on whether or not a conflict between Council and the Mayor existed?
3. Why the Solicitor suffered a total lack of recollection of the underlying events?
4. Why, even after considering, and reconsidering, his opinion regarding the existence of a conflict, the Solicitor continued to not pursue an RFP?

¹⁹ Council is an elected body, responsible for the financial well being of the City, and holds the purse strings. At the time of the underlying events, without diverging far from the record, the City fell within the protections of Act 47 as an economically distressed municipality. Yet Council, and the Solicitor, ignored a basic economic safeguard in the RFP process.

Although the Board's inquiry on this subject stops here, the answers to these issues have consequences for the citizens of Reading in a matter of fundamental and critical importance to this community, thus necessitating this *obiter dictum*.

III. DECISION OF THE BOARD

A. Conclusions of Law

The Board makes the following determinations:

1. The Administrative Code requires, under all circumstances, that retention of counsel, other than the Office of the City Solicitor, shall be by the RFP process outlined in Administrative Code, Section 8, *Purchasing of Professional Services*.
2. A Charter or Administrative Code violation, committed directly or indirectly, by an authorized agent of a particular department, office or agency of the City (in this case, Council), does not absolve such body from liability for such Charter or Administrative Code violation.
3. Regarding, the authority and responsibility for oversight of the Solicitor retention of independent counsel for Council, rested with Council.
4. In this matter, the Solicitor's compliance with Resolution 45A-2014 as it related to the retention of independent counsel did not involve the provision of legal advice and there is no evidence that the Solicitor's failure to utilize an RFP involved any legal determination by the Solicitor.
5. The Charter Board specifically rejects neglect, and lack of oversight or monitoring of an agent, whether or not legal counsel, as a justifiable excuse permitting violation of the Charter or Administrative Code.
6. Despite delegating the retention of independent counsel to the Solicitor, the "buck stops" with Council, in that it had the responsibility to comply with the requirements

of the Administrative Code, Section 8, *Purchasing of Professional Services*, regardless of to whom it delegated the task of retaining counsel.

B. Holdings of the Board

On the basis of the foregoing findings of fact, legal discussion and determinations of the Board, the Board holds the following:

1. There is insufficient evidence and legal authority for the Board to conclude that Council violated the Charter, Amendment I, Section 1, or Article I, Section 102, as a result of negotiating, and having executed by the Mayor, the 4th Lease Addendum.
2. Council violated Administrative Code, Section 8, *Purchasing of Professional Services*, in its retention of Stevens & Lee, without proceeding in accordance with that section.

IV. PENALTIES IMPOSED

Having considered the applicable factors stated in the Charter Board Ordinance at Section V(B)(2)(a)(i), and as a consequence of the foregoing violations of the Charter and Administrative Code by the Council, the Board imposes the following penalties:

A. Public Censure

The Board will notify the news media of this decision and provide the news media with a copy of the original of this Final Opinion & Order, and provide such other notice and information as required and permitted by Section V of the Charter Board Ordinance.

B. Considerations of the Board

In determining the penalties assessed against the Council, the Board considered each of the factors set forth in Section V(B)(2)(a)(i) of the Charter Board Ordinance, and now addresses the factors it finds applicable to this matter.


The Board finds the offense serious, given the poor financial condition of the City, the financial trust granted to Council by the citizens of the City, and Council's total lack of oversight of the Solicitor. Conduct by Council such as this erodes confidence in City government and encourages waste. Regarding prior complaints against Council, there have been a number of matters investigated by the Board. However, and most notably, this has been the third matter in which Council defended on the basis of its reliance on the Solicitor. The Board considers Council's conduct reckless, or at a minimum, negligent, failing to ensure that the Solicitor utilized the RFP process in retaining independent counsel.

The Board is of the opinion that the best penalty, and perhaps one that will serve as the greatest deterrent in this circumstance, is a public censure.

V. ORDER

The Charter Board enters the Order attached hereto.

CITY OF READING CHARTER BOARD

By: 
James R. Fegley, Chair

Date: 10-19-16

THE CHARTER BOARD OF THE CITY OF READING

IN RE: 4th Lease Addendum Between : Complaint Received: Feb. 19, 2016
 City of Reading and Reading, :
 Area Water Authority : Investigation No. 47

ORDER

AND NOW, this 19th day of October, 2016, after conducting the evidentiary hearing requested in Charter Board Investigation No. 47, in accordance with the Charter Board Ordinance, No. 46-2005, *as amended*, the Charter Board of the City of Reading (“Board”) finds that in accordance with the attached Opinion of the Board, the City Council of the City of Reading, (“Council”) violated Administrative Code, Section 8, *Purchasing of Professional Services*, in that it did not utilize the Request for Proposals process in the retention of the law firm of Stevens & Lee as counsel independent from the Office of the Solicitor.

The Board further finds that in accordance with the attached Opinion of the Board, Council did not violate the Charter, Amendment I, Section 1, or Article I, Section 102, as a result of negotiating, and having executed by the Mayor, the 4th Lease Addendum to the lease agreement between the City of Reading and Reading Area Water Authority.

In accordance with the attached Opinion of the Board, the following is **ORDERED**:

1. Council shall be publicly censured as provided by Section V of the Charter Board Ordinance and Section IV(A) of the Board’s Final Opinion & Order;

2. Copies of this Final Opinion and Order shall be transmitted to the following:

 (a) each current member of Council (via email and US Mail, certified, return receipt requested, c/o the Office of the City Clerk);

- (b) Mark Merolla, Esquire, counsel for Council, (via US Mail and email);
- (c) Elizabeth A. Magovern, Esquire, Investigative Officer, City of Reading Charter Board (via US Mail and email);
- (d) Complainant, Ernest H. Schlegel, Jr. (via certified, return receipt US Mail);
- (e) Each member of the City of Reading Charter Board (via email);
- (f) Charles D. Younger, Solicitor, City of Reading; and
- (g) Eric B. Smith, Solicitor, Charter Board.

CITY OF READING CHARTER BOARD

By: 
James R. Fegley, Chair